In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 234

CONTINENTAL OIL COMPANY, PETITIONER

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR, PHILLIPS PETROLEUM COMPANY AND AZTEC OIL & GAS COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR STEWART L. UDALL IN OPPOSITION

OPINION BELOW

Neither the court of appeals nor the district court wrote an opinion. The findings of fact and conclusions of law of the district court appear at J.A. 165. The opinion of the Secretary of the Interior (J.A. 38) is reported at 68 I.D. 337.

JURISDICTION

The judgment of the court of appeals was entered on February 10, 1967 (Pet. App. A–1), and a petition for rehearing was denied on March 15, 1967 (Pet. App. A–2). The petition for a writ of certiorari was

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filed on June 9, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Secretary of the Interior was correct in defining the area covered by certain oil and gas leases of Indian tribal lands according to public land sections rather than by metes and bounds, where both descriptions appeared in the leases.

2. Whether certain materials were improperly included in the administrative record.

STATEMENT

The Bureau of Indian Affairs advertised the sale by competitive bidding of oil and gas leases covering 528,000 acres of Navajo tribal lands in Arizona and Utah (J.A. 16). Part of the area had been surveyed under the standard federal rectangular survey system; part was unsurveyed. The area was offered for leasing in 214 numbered, rectangular tracts (J.A. 16, 157). In the surveyed area, each tract was described by four section numbers in a specific township and range. In the unsurveyed area, each tract was described by metes and bounds whose courses and distances approximated the normal acreage and location of four regular sections as projected from the adjacent surveyed area (J.A. 22–28, 155, 157), and each description also stated that the tract "when surveyed probably will be described as follows," giving specific section, township and range designations from that projection.

The advertisements stated that (1) the land was offered on a tract, not on an acreage, basis; (2) the

acreage stated was solely for the purpose of computing annual rentals prior to survey; (3) before permission to drill wells would be granted the lessee must have the premises surveyed, boundaries posted with substantial monuments and a tie established with the nearest United States Public Land Survey; and (4) the leases were subject to existing and future regulations of the Secretary of the Interior (J.A. 17–19). The regulations then (and now) provided, 25 C.F.R. 186.8 (now 171.8): "The area covered by a lease shall be in a reasonably compact body and shall conform to the system of public-land surveys * * *."

Petitioner submitted successful bids on two unsurveyed tracts. Predecessors of respondents Phillips Petroleum Company and Aztec Oil & Gas Company successfully bid in the two abutting, unsurveyed tracts to the north. However, before any of these leases were issued, a group of oil companies which had bid successfully asked the Bureau of Land Management to conduct a public land survey of the area. The survey was to be of township boundaries only, with section and quarter-section corners established on the perimeter but no interior sections laid out. It was understood that any company surveyor could then accurately locate the lease tract boundaries within the townships.

The Bureau undertook the survey. In its instructions to the surveyor, it pointed out, as had been discussed with the chairman of the oil companies' committee, that the existing survey of the adjacent area (into which the survey must be tied) contained a north-south measurement shortage of 7.40 chains and that, in conformity with accepted practice, the neces-

sary adjustment should be placed in the south tier of quarter sections across particular townships (J.A. 160–162). When the survey was made, the oil companies, including petitioner, paid for it (J.A. 42). The adjustment had the effect of moving the common boundary between petitioner's tracts and Phillips-Aztec's tracts 624 feet south into petitioner's area as defined by the metes and bounds description.[1]

A few days before the survey was completed, leases were issued to petitioner and Phillips-Aztec embodying the terms and descriptions of the advertisement for sale (J.A. 30–37, 42, 64–65, 92). Three years later, petitioner, as required before commencing drilling, filed a survey plat showing its tracts in terms of the public lands sections, and on that basis was given permission to drill and brought in a producing well (J.A. 39, 42, 45).

Petitioner later filed a second plat showing its tracts in terms of the metes and bounds descriptions, sought permission to drill within the 624-foot-wide strip (shown by this plat to be within its leasehold), and urged denial of a permit sought by Phillips-Aztec to drill there (J.A. 39, 45). Petitioner's application was denied and that of Phillips-Aztec granted (J.A. 83–87, 90–95, 38–46). The district court concluded that the Secretary's decision was lawful and supported by the administrative record (J.A. 165–166), and the court of appeals affirmed without opinion (Pet. App. A–1).

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[1] Since their common boundary extends for four miles, this amounts to about 300 acres (J.A. 39, 42).

ARGUMENT

The decision of the court of appeals is correct, and there is no basis for further review.

1. Both the advertisement for sale and the leases indicated unmistakably that the lease-tract boundaries were to conform to the system of public land surveys, as required by the Secretary of the Interior's regulations. Petitioner showed its understanding of this requirement when it filed the first survey plat, which described the lease-tracts according to the official survey. Phillips-Aztec shared this understanding, as did the other oil companies—including petitioner—in asking for an official survey at the outset. It was and is obvious that the public land survey must stand as the permanent survey of the area. Great confusion would result if a second monumented survey in the area were adopted for purposes of the oil and gas leases.

2. Petitioner asserts that certain materials—interoffice memoranda and other internal documents of the Department of the Interior—should not have been included in the administrative record (Pet. 11–14). The point might be well taken had there been formal administrative hearings here, with testimony by witnesses, cross-examination, and other formal evidence. But since no formal hearing was held—or requested—at the administrative level,[2] the Secretary was entitled to examine the Department's administrative file and rely on the materials therein in reviewing the

[2] Since no statute requires a hearing, the provision of the Administrative Procedure Act for a determination on the hearing record was not applicable. 5 U.S.C. 554(a); *Northwest Bancorporation* v. *Board of Governors*, 303 F. 2d 832, 842 (C.A. 8).

action of his subordinates. Petitioner, we stress, was not refused access to these documents, and all materials submitted by petitioner were received and considered. Accordingly, it was proper to include in the administrative record the documents which the Secretary considered in making his decision. This was, indeed, essential for intelligent review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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